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IN THE

# Supreme Court of the United States

NO. 73-1150

OCTOBER TERM, 1973

RONNIE WEEDON, *Petitioner*

Against

THE STATE OF TEXAS, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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**PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS**

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The Petitioner, Ronnie Weedon, prays that a writ of certiorari be issued to review the judgment of the Court of Criminal Appeals of the State of Texas of November 7, 1973.

## OPINION BELOW

Petitioner's conviction and sentence of ten (10) years confinement in the Texas Department of Corrections, assessed in the 99th Judicial District Court of Lubbock

County, Texas, was, on November 7, 1973, affirmed by the Court of Criminal Appeals of the State of Texas. On December 5, 1973, Petitioner's Motion for Leave to File Appellant's Motion for Rehearing was denied without written order by the Court of Criminal Appeals of the State of Texas. See 501 S.W.2d 336. Petitioner has exhausted all available State remedies for his appeal. (See Appendix "A").

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3) and Rule 19 (1), Revised Rules of the Supreme Court of the United States of America.

## QUESTIONS PRESENTED

Whether Petitioner was deprived of due process of law by failure of the trial court to conduct a Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, (1964), type hearing, out of the jury's presence, on the admissibility of the Petitioner's Oral Statement-Confession when same did not comply with Miranda vs. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)?

Whether Petitioner was deprived of due process of law by the trial court admitting Petitioner's Oral Statement-Confession in to evidence when same was in violation of Miranda vs. Arizona, supra, and Orozco vs. Texas, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969)?

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions and statutes involved are set out below. (Appendices "C", "D", and "E", pp. 40-42).

## STATEMENT OF FACTS

Petitioner was tried before a Jury on a plea of not guilty for the alleged criminal offense of murder with malice aforethought, found guilty, and his punishment was assessed by the same jury at ten (10) years confinement in the Texas Department of Corrections.

The State of Texas did not have any live witnesses to the killing; her case being presented from evidentiary findings at the scene and, most important, by statements Petitioner made to law enforcement officials who came to the scene to investigate the cause of the killings.

## SUMMARY OF FACTS

As pertains to the questions Petitioner raises, the following pertinent facts are presented.

JAMES SINGLETON, Texas Ranger Investigator, testified he received a telephone call from Bill Neely (133), of the Sheriff's Office around 6:30 O'Clock A.M. (64), arrived at Appellant's residence at approximately 6:50 O'Clock A.M. (65). Other police officers were already at the scene. He saw and spoke to Appellant after entering the premises. (117). After this, Singleton then saw the other police officers as well as Perry and two dead bodies on the floor in one of the rooms. He recognized the body of McGann. He then learned the other body was Meshell. At this time, Appellant approached Singleton. (119). Over objection and without being given the opportunity by the Learned Trial Judge to conduct a "Jackson v. Denno" type hearing, (121), Singleton testified first *on a bill of exception out of the jury's presence* that Appellant "explained to me the circumstances that occurred prior to our arrival." The Appellant related to Singleton that:

> "He had shot and killed Mr. McGann and possibly used both weapons." (122, 138)

Singleton testified he gave Appellant *only* the following warning:

> "He didn't have to make a statement and he could have an attorney present." (123, 128, 136, 137)

The Learned Trial Judge then overruled another objection of Appellant. This action of His Honor was tantamount to permitting Singleton to relate to the jury the conversation he had with Appellant. "I believe in the state of the record at this time that the Court will respectfully overrule your objection." (124) (128) (137). The Learned Trial Judge permitted Appellant's counsel "to object to it now . . . and not object to it while he is on the stand" as "It will be all right for you to make it as a part of your bill without making further objections to it if you want." (124). A further attempt, after the objection was overruled, to take the witness on voir dire was again made and again overruled. (126).

Singleton related to the jury that Appellant approached him and told him that "I would like to talk to you" and he "desired this to be in private." (127). The two then stepped into another room. It was after the Appellant told Singleton "that he could clear this matter up and say specifically what had happened," that Singleton then gave Appellant the deficient oral "Miranda" warning. See supra and see also pp. 128 of the Statement of Facts. Even though Appellant asked Singleton "would I need one [an attorney]?", and that he had attempted to contact two (2) attorneys, one in Lubbock and one in Houston, Singleton, nevertheless, permitted Appellant, without first

obtaining a waiver of his right to counsel, to state that "he had shot and killed George McGann, possibly with both guns." At this time Singleton left the room.

On cross examination, it was developed that even though the Appellant was neither in custody, under investigation nor suspected of anything, the purpose of giving a legal warning was "Nothing other than normal procedure." (137). However, he varied from his "normal procedure" when he talked with the witnesses Frances Keith and Marshall Perry in that he did not warn them when he spoke to them. (138). As to the conversation between Appellant and Singleton, Appellant told him:

> "That during his excitement that he had shot and killed George McGann and had possibly used both guns." (138).

Singleton related that Appellant told him that McGann, after shooting Meshell, "threatened Mr. Perry and Mr. Weeden and possibly Miss Golden, if she was still in the room." (139). The threat encompassed pointing a gun at them. (140). "As I recall he [McGann] told them [Perry, Appellant and Miss Golden] that he would have to dump the body somewhere and to get all their stuff gathered up" and "he [McGann] also told him [Weeden] that he wasn't going to leave any witnesses . . ." (139). Appellant also related to Singleton that:

> ". . . he examined the body of Mike Meshell, [after McGann had shot Meshell] and McGann was holding the gun. Mr. Weeden raised up from the body and as he did he saw a .45 laying on the counter top near the body, where Mr. Meshell was laying." That as he [Weeden] turned and faced George McGann he reached and got the .45 and stuck it

> either in his rear pocket or up in the small of his back under his trouser belt, and at that time he [Weeden] approached McGann in some type of conversation more or less pleading with him not to shoot the other people in the house . . . including himself . . . but that McGann was threatening to kill everybody in the house." (141).

Singleton was not told nor did he know that McGann was questioned previously regarding "a bunch of crimes in Dallas and Ft. Worth that was Mafia connected." (142-143). He was aware of two or three murder investigations involving McGann. Appellant also related to him that:

> "He [Appellant] said that he did get into a scuffle in an effort to obtain the weapon from Mr. McGann. (146).

This information, related to Singleton by Appellant, was also placed in Singleton's offense report as an official report of the episode. He also did not recall telling the Assistant District Attorney that McGann "had killed twelve people and Mike Meshell was his thirteenth." (171). He further related in his offense report that Appellant told him.

> Subject Weeden advised the writer that he desired to talk with him in private to clear up the matter, stepping into an adjacent utility room in the kitchen, stating that he desired to tell me specifically what had occurred at that time and the writer advised Weeden of his constitutional rights and he asked if he would need an attorney and I asked if he had called an attorney. Weeden said that he had contacted his other attorney Bill Broom, in Houston relating the prior events. Weeden stated that he had shot and killed McGann during a fight and he thought

that he shot him with both weapons during his excitement as a result of McGann shooting subject Meshell (175-176).

Weeden also told the writer that Meshell and McGann came to his house sometime after midnight (179), that they had several drinks and both of them were very intoxicated and were spilling drinks. Weeden suggested that they go to bed, and that Meshell went to bed in the northeast bedroom and that Weeden had to help him undress because he was intoxicated and that he assisted McGann to the middle or east bedroom where McGann took off his sweater, shirt, and pants. Weeden noticed that McGann pulled a .38 caliber snub nose revolver from the rear of his pants or belt and laid it near the headboard. (180). A short time later Meshell began to create a disturbance, knocking the door in the bedroom, using profanity, coming into the den area where Weeden was then sitting in a lounge chair, going to the bar to get another drink and knocking over bottles and glasses, and insulting Frances with a remark. Then at this time Weeden took exception to his action and told him that they were going to have to get this straightened out by going outside, and Weeden pulled off his black undershirt and threw it on the couch and they went out the back kitchen door area where they settled their differences. (182). As Weeden stepped out the back door he struck Meshell and some blood came from the wound [see Judy Duke's testimony supra] dripped down on the door and what not, and Meshell reached up and wiped his head with his hand and smeared the blood on the door facing with his hand. Weeden whipped him and came back into the house and Meshell was patting Weeden and putting his arm around Weeden and stating that they were friends. About fifteen minutes later the telephone rang and Weeden thought that he answered the telephone.

Mike talked for a while although Weeden did not know what about. Mike stated that George is here and whoever he was talking to apparently wanted to talk to George. Someone awoke George McGann, he came into the room fully dressed with a revolver tucked under his belt in front, sat on the stool and talked to the party on the telephone. Suddenly he drew his pistol and fired two times into Meshell standing by the kitchen bar and then aimed the pistol at us, stating I can't leave any witnesses, telling Marshall Perry who was seated in the northwest corner of the den not to move; further stating to Weeden, let's get it all together. He began to back up east, toward the hall and bedroom and at this time Weeden obtained a .45 caliber pistol from the area of Meshell's body, putting the pistol in his rear pocket or under his belt in the small of his back. Weeden began to plead with McGann not to kill them and asked him what's the matter. Weeden walked with him up close across the room, and when they got near the hall and den doorway, Weeden began to struggle with McGann for his pistol at which time the gun discharged several times and Weeden thought that he shot him with the .45. Weeden thought McGann had told Frances to go to the bedroom when this took place. Weeden then called his attorney, called the Department of Public Safety and the Sheriff's Office by telephone. (185-186). Meshell was standing at the end of the bar and McGann was talking the second time, and after Meshell had talked, pulled his pistol and fired two times while holding the phone in his left hand. Weeden moved off the stool to check Meshell on the floor and he was still breathing. Weeden said, "he's dying," let's get a doctor. McGann said we are going to lay the body somewhere, I can't have any witnesses. McGann pointed his gun at Perry and told him not to move. At this time Weeden recalled raising up and seeing a .45 pistol that belonged to Meshell that was laying on the lower

> portion of the bar, split level, near the bottom. Weeden put it in his belt or rear pocket and began to talk to McGann as he backed across the room prior to jumping him in the hall area or the door of his bedroom with the gun going off (4) several times, he didn't know how. (199-201).

Singleton testified he talked with Appellant on three different occasions; once at the house; once at the District Attorney's Office, and then again at his home. (192).

> Q. He told you the same things all three times?
> A. Yes, sir.
> Q. You checked it out and proved it to be true?
> A. Later I checked with the party that made the phone call, yes, sir. (192).
> Q. You verified all of it, didn't you?
> A. Yes, sir.
> Q. Everything that he told you was true, wasn't it?
> A. As far as I know, yes, sir.
> Q. You certainly couldn't disprove it, could you?
> A. No, sir.
> Q. It was just exactly the way that he said it happened?
> A. Yes, sir.
> Q. Did you file charges against Ronnie Weeden for Murder?
> A. No, sir.
> Q. Because you have verified everything that he said was true?
> A. I didn't file any charges against him, no, sir. (206-207).

The witness Keith, also interviewed by Singleton, which interview was placed in his offense report, told him:

> Information same as above until telephone rang. Frances Weeden stated that Ronnie Weeden answered

> the telephone. It was Robbie asking for McGann and Weeden handed me the phone. Frances talked to Robbie for a second and handed the phone back to Weeden and went into the bedroom to wake up McGann. His pants were on the floor and Frances handed him his glasses from the floor and he dressed and came into the den for the phone call. And Frances thought that she had to wake him up two times and she recalled turning the light on and closing the door when she came out of the bedroom. McGann had a pistol in his belt, he talked, Meshell talked and McGann talked. McGann told Frances to go to the bedroom and she left and did not see the shooting but heard two shots. She stayed in the bedroom with the door locked until Weeden came. (199).

As to the missing two shots, we find the following:

> He [McGann] told me [Frances] to go into the bedroom and go to bed, and I went in and shut the door, then I heard some shots. I don't know how many but I heard one group and then there were some more later, but not too much later. The second shots were from another place because I could hear them better, they were closer to the bedroom. (240).

As to the interview between Singleton and Marshall Perry, Perry related to Singleton the following:

> Perry said he was actually seated in á chair at the time the scuffle took place. Perry said the man pointed the gun right at his head. (201).

Singleton also testified that he found four (4) gun shot wounds in McGann and found four (4) expended cartridges which came from the .38 and the .45. (206).

Singleton also testified that he went to Midland and talked to Sid Trevino who told him that he had loaned the .38 pistol to McGann. (211). He also related that he talked with a Taylor Wayne Hodges who informed him about a hijacking of a poker game in Lubbock which McGann was going to commit. (213). A tape recording, either legal or illegal, was also listened to concerning McGann's activities in Dallas. (215).

JIM COOPER, PRESENTLY UNEMPLOYED, was employed at the time of the occurrence as an investigator for the Lubbock County Sheriff's Department. He testified that on the day in question a little after 6:00 O'Clock A.M. he went to the residence of Appellant. He was met at the door by Appellant. He had a report of a killing (prior to being met by Appellant) when he arrived. He went on inside the residence. Other officers were also present at this time. (268). When he got to the south side room of the residence he saw the two bodies of McGann and Meshell. (287). They were dead as they were not breathing. Appellant told him the names of the bodies. (288). Cooper called the Sheriff's Department and asked for Neeley and Montgomery to come to the scene. He observed a bullet on the floor. (288).

Cooper was recalled on rebuttal by the State of Texas and he testified, over objection, to the inadmissible conversation he had with Appellant. (527). He testified that Appellant told him there had been a double shooting and that McGann and Meshell had shot one another.

The Court's attention is also directed to Appendix "B" which contains copies of pages from the Record on Appeal which pertain to these issues.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

Petitioner submits that it is mandatory, when first raised and requested, for a trial court to hold a *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964), type hearing, out of the jury's presence, where the State intends to introduce into evidence an oral statement of a defendant.

Petitioner, in any event, submits that the oral statement-confession of this Petitioner, in this cause, is invalid as same was not taken in compliance with *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1062, 16 L.Ed. 2d 694 (1966).

In *Turner v. United States*, 1968, 387 F.2d 333, the Court of Appeals for the Fifth Circuit, speaking through Circuit Judge Bell, adequately put the question when it held:

> Prior to trial defense counsel filed a motion to suppress any and all admissions made by appellant to federal agents while under arrest or detention, contending that she was not fully advised of her right to counsel or of her right to remain silent within the teaching of Miranda v. State of Arizona, 1966, 384 U.S. 436, 86 S.Ct. 1062, 16 L.Ed. 2d 694. The hearing on the motion was continued by stipulation to the time of trial. During the course of the trial and when the admissions were offered by the prosecution, defense counsel objected on the basis of Miranda and moved that the voir dire on admissibility be heard by the court outside the presence of the jury. Defense counsel also moved that the defendant be allowed to testify in rebuttal at that time and prior to her case in chief. The Court denied the motion for a hearing

outside the presence of the jury but did not explicitly rule on the motion to permit appellant to testify as requested.

The FBI agent who had obtained the admissions was examined in the presence of the jury, counsel argued in the presence of the jury and the court ruled the evidence admissible in the presence of the jury. The ruling that she was denied no Miranda right was based on a combination of advice given appellant by the arresting officer and waiver on her part. This ruling on admissibility pertains to the first assignment of error and we hold that the ruling was not erroneous. The situation is quite different, however, with respect to the procedural error embraced in the second assignment of error.

The voir dire in connection with the admissibility vel non of the oral admissions, once the issue was drawn, should have been conducted outside the presence of the jury. See Fisher v. United States, 5 Cir., 1967, 382 F.2d 31, 35; and Everitt v. United States, 5 Cir., 1960, 281 F.2d 429, 434.

It is also reversible error not to permit the defendant, in such circumstances, to testify on the admissibility voir dire and prior to her case in chief, whether a confession or admission, oral or written, be involved. It is then that a defendant may need to testify in rebuttal to the prosecution's proof, and this, too, should take place outside the presence of the jury. United States v. Carignan, 1951, 342 U.S. 36, 72 S.Ct. 97, 96 L.Ed. 48; and Schaffer v. United States, 5 Cir., 1955, 221 F.2d 17, 20-22.

That the objection is based on the failure to give Miranda type warnings rather than on evidence of physical or mental coercion does not indicate a different result. The rationale of Miranda is that incustody interrogation is in itself coercive to the extent that adequate notice of the right to remain silent and

the right to have counsel present must be given in order to safeguard the constitutional privilege against self incrimination. Cf. Marion v. Harrist, 5 Cir., 1966, 363 F.2d 139, 140-142.

The procedure outlined in Jackson v. Denno, 1964, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908, and Sims v. State of Georgia, 1967, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed. 2d 593, was followed here of an independent determination of voluntariness by the trial judge prior to submission of the question to the jury. However, the determination should have been made outside the presence of the jury with appellant having the right to be heard. Cf. United States v. Inman, 4 Cir., 1965, 352 F.2d 954.

Reversed and remanded for further proceedings not inconsistent herewith.

Petitioner submits and contends that he was deprived of due process of law in the following particulars:

1. The trial court, when the issue was first raised, should have, pursuant to Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964), conducted a hearing out of the jury's presence on the admissibility of the oral statement-confession of Petitioner.
2. The trial court should have suppressed the oral statement-confession of Petitioner as it was not shown that same complied with Miranda v. Arizona, supra.

Appellant submits that when his trial counsel said: "Well, we object to it on this [sic] grounds, it does not conform with the *Miranda* statute [sic] or any other statute," (S.F. 123), that it then became incumbent upon the Court to conduct a *Jackson v. Denno,* supra, type

hearing. "Upon defendant's "Miranda" objection to admissibility of statement offered by [State], the trial court must hold a hearing outside the presence of the jury." See *U.S. v. Nielsen,* Seventh Circuit, 392 F.2d 849.

The decision of *Turner v. U.S.,* supra, was later reaffirmed in *Davis v. Beto,* 1970, 423 F.2d 633, where that Court said:

> The Jackson v. Denno contention, however, must be considered separately from the issue of voluntariness. See Smith v. State of Texas, 5 Cir., 1968, 395 F.2d 958. This contention was presented in petitioner's pro se petition to the district court and there is no indication that it was ever considered. Also, it is not clear whether petitioner's state court remedies have been exhausted on this issue. The case must therefore be remanded to the district court for a determination first of the exhaustion of state remedies question. If the petitioner has properly exhausted his state remedies, then the district court should consider the Jackson v. Denno issue. See Smith v. State of Texas, supra; Fisher v. United States, 5 Cir. 1967, 382 F.2d 31; and Turner v. United States, 5 Cir. 1968, 387 F.2d 333.

This rule of law has also been adopted by other Circuits of these United States. See *U.S. v. Nielsen,* Seventh Circuit, 1968, 392 F.2d 849, where that Court said at page 852:

> To avoid the possibility of thus penalizing an accused for an exercise of his constitutional rights, we hold that whenever a defendant, by appropriate objection to proffered testimony concerning his statement made during custodial interrogation, contends that those statements were made in the absence of a knowing and intelligent waiver of his rights to

> remain silent and consult an attorney, the court must excuse the jury and conduct a voir dire hearing to resolve the issue. Cf. Jackson v. Denno, 378 U.S. 366, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964). See, Tucker v. United States, 375 F.2d 355 (8th Cir. 1967); Evans v. United States, 375 F.2d 988 (4th Cir. 1967). A voir dire hearing would prevent the jury from drawing prejudicial inferences by reason of testimony that the defendant sought to exercise his constitutional rights. In addition, such a hearing would enable the defendant to testify on the issue of waiver without relinquishing his privilege to remain silent at the trial. Finally, this procedure enables the court to make a fully informed determination on the question of the admissibility of the defendant's custodial statements. Because the procedure followed in the instant case was not compatible with protecting the defendant in the exercise of his constitutional rights, prejudicial error occurred.

This Court's attention is also directed to the decisions of *Sigler v. Parker*, 1970, 396 U.S. 482, 90 S.Ct. 667, 24 L.Ed. 2d 672; *Morales v. New York*, 1969, 396 U.S. 102, 90 S.Ct. 291, 24 L.Ed. 2d 299; *Procunier v. Atchley*, 1971, 91 S.Ct. 485, 400 U.S. 446, 27 L.Ed. 2d 524; and *Pinto v. Pierce*, 389 U.S. 31, 88 S.Ct. 192, 19 L.Ed. 2d 31 (1967). Compare also *Swenson v. Stidham*, 404 U.S. 1058, 92 S.Ct. 732, 30 L.Ed. 2d 745 (1972),[1] and see also the Fourth Circuit decision of *U.S. v. Inman*, 352 F.2d 954.

Is there anyway that one could argue that the dictates of *Miranda v. Arizona*, see supra, and *Jackson v. Denno*, 378 U.S. 368, do other than require that initially a hear-

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1. See also 405 U.S. 913, 30 L.Ed.2d 782, 92 S.Ct. 931 (93 S.Ct. 955) (1973).

ing out of the jury's presence must be held. The issue of an involuntary confession is separate and apart as to whether or not a hearing must be held. The issue of the applicability of Miranda is separate and apart from the question of an alleged involuntary confession as to whether or not a hearing must be held. If the trial judge had held a *Jackson v. Denno,* see supra, type hearing, and fully developed the facts at said hearing and entered findings of fact and conclusions of law, then, unquestionably, if the matter had not changed during the trial of the case, then Appellant would certainly be wasting this Court's precious and valuable time. However, that is the point. This did not take place. This did not occur. If a hearing outside the jury's presence had occurred, then another question might very well be present. But, this did not occur. To require this Appellant to develop this in the jury's presence would, as in pre-*Jackson v. Denno,* days, see supra, be an act without meaning. The horse has left the barn. Why bother to close the gate?

Appellant submits that where the brooding omnipresence of the police, even at a person's home, is present, then he is certainly under detention and restraint. Also, it is the subjective and not the objective test which controls; i.e., what was the defendant thinking or, if nothing from a defendant, what would a reasonable, prudent man be thinking at the time? How can it be argued where a man asks about seeing an attorney where there are two (2) dead bodies, killed by gunshot, in his home, that he is not under custody, arrest or under restraint? True, Appellant was not formally arrested by INDICTMENT WARRANT FOR SOME TIME. However, merely because the police do not place a person under "formal arrest" this should not mean *Miranda v. Arizona,* supra,

has no meaning or applicability. Compare *People v. Paulin*, New York, 255 N.E.2d 164. The test to be applied is, was he in fact restrained in any significant way or was he, "as a reasonable person," led to believe that his freedom was restrained in any significant way. See *People v. Rodney P.*, New York, 233 N.E.2d 255; *Windsor v. U.S.*, Fifth Circuit, 1968, 389 F.2d 530; and *Rosario v. Guam*, Ninth Circuit, 1968, 391 F.2d 869.

Unquestionably, two questions arise, almost simulanteously:

1. Why did Singleton give Appellant part of the Miranda warning if he did not think Appellant was in need thereof?
2. Why did Appellant ask "would I need an attorney" if he did not think he was under arrest or under restraint?

In *Orozco v. Texas*, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed. 2d 311 (1969), the Supreme Court held that a suspect was the subject of custodial interrogation even though the questioning was brief and took place in his own bedroom. Petitioner here was a "virtual defendant." See *U.S. v. Morado*, 454 F.2d 167 (5th Cir.).

Appellant strenuously urges that Miranda is applicable and, for this reason, the statement should have been excluded, and, for the additional failure to either hold a hearing or exclude the statement, certiorari should be granted and this cause should be reversed and remanded for a new trial.

Petitioner was, therefore, by such failures, deprived of due process of law as provided by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America. (See Appendices "C", "D" and "E").

## CONCLUSION

For all the reasons stated herein, Certiorari should be granted in this Cause. The ruling and Judgment of the Court of Criminal Appeals of the State of Texas, made and entered on November 7, 1973, should be reversed and this Cause should be remanded to the said Court of Criminal Appeals of Texas to enter an Order reversing its former Judgment and remanding this Cause for new trial to the 99th Judicial District Court of Lubbock County, Texas.

Respectfully submitted,

MARVIN O. TEAGUE
*Attorney for Petitioner*
999 State National Building
412 Main Street
Houston, Texas 77002
222-1728

## CERTIFICATE OF PROOF OF SERVICE

I, Marvin O. Teague, Attorney for Petitioner, Ronnie Weedon, hereby certify that a copy of the foregoing Petition for a Writ of Certiorari has been deposited in the United States Mail, postage prepaid, certified, and properly addressed to Respondent's Counsel, Honorable John L. Hill, Attorney General of the State of Texas, State Supreme Court Building, Austin, Texas, this the _____ day of January, A.D. 1974.

MARVIN O. TEAGUE

**APPENDIX "A"**

NO. 46,795

RONNIE WEEDON, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from LUBBOCK County

OPINION

The offense is murder with malice; the punishment, ten (10) years.

The sufficiency of the evidence both to support the conviction and to show malice is challenged by grounds of error twelve and thirteen.

The State's evidence consisted primarily in what was found at the scene of this double murder, as analyzed and explained by expert witnesses and the declarations made by appellant to the officers who arrived in answer to a call.

According to Officer Singleton appellant told him "that he had shot and killed George McGann, possibly with both guns."

The bodies of both George McGann (the deceased named in this indictment) and Mike Meshell were found dead on the floor of appellant's home. Meshell had been shot twice. McGann had been shot four times. In their investigation the officers found five .38 caliber bullets and an empty five-shot .38 caliber pistol that fired the bullets. They also found a .45 caliber bullet and the .45

caliber pistol that fired it. The .45 bullet was found under McGann's body, where the floor tile was indented in the shape of the bullet.

The State's expert witness, a chemist, testified, on the basis of powder burns, that the bullets penetrating McGann's body were fired from a distance of three to five feet.

We conclude that the evidence is sufficient to support the conviction. With respect to malice, it may be inferred from the use of a deadly weapon. Jones v. State, 472 S.W.2d 515; Tsamouris v. State, 472 S.W.2d 141; Hart v. State, 455 S.W.2d 237; Redd v. State, 452 S.W.2d 919; Howard v. United States, 389 F.2d 287 (D.C. Cir. 1967).

In grounds of error numbers one through six, appellant complains of the testimony of Ranger Singleton relating to his conversation with appellant when arriving at appellant's home where he had gone to assist local officers in the investigation. At the moment of arrival the investigation had not centered on anyone and no one was in custody. He first spoke to the local officers who were present at the residence, observed two dead bodies, and then was approached by appellant, whom he knew. Appellant first said, "I would like to talk to you in private." The two of them then stepped into another room and appellant said he "could clear this matter up". At that juncture the ranger told appellant "he didn't have to make any statement and he could have an attorney if he so desired." Appellant asked, "Would I need one?" The ranger asked if he had contacted an attorney. Appellant said he had tried to contact Mr. Phil Brummett (a local lawyer) and was unable to do so and had contacted a lawyer in

Houston. According to the ranger, without further questioning appellant stated at that time, "that during his excitement he had shot and killed George McGann [the deceased] possibly with both guns." After this conversation appellant left the room and the ranger continued in the investigation.

Before discussing the admissibility of the above statements, we observe that unlike the normal case the testimony did not stop at this juncture; rather appellant was able to develop on cross-examination of Officer Singleton for approximately 150 pages his entire defensive theory of self-defense.

We return to the questioned testimony and conclude that appellant was not under arrest or in custody, nor was he deprived of freedom of movement in any significant manner at the time of the above conversation. This conversation occurred on September 29, 1970, and appellant was not arrested until March 15, 1971. It, therefore, follows that these statements were not admitted in violation of the terms of Art. 38.22, V.A.C.C.P., or the holding in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694.

By his seventh and eighth grounds of error, appellant complains of the introduction of certain photographs of the dead bodies found at the scene. These exhibits, as far as we can determine, pictured bodies and some of the wounds inflicted. The photographs, according to the testimony, do not reflect the results of an autopsy as in Terry v. State, 491 S.W.2d 161. In Martin v. State, 475 S.W.2d 265, this Court held that a verbal description of a body and its wounds would be admissible and a photograph depicting the same would be admissible, overruling prior

decisions in conflict therewith. See also Fields v. State, ____ S.W.2d ____ (#46,999, 10/24/73), Byrd v. State, 495 S.W.2d 226, Foster v. State, 493 S.W.2d 812, and Lanham v. State, 474 S.W.2d 197.

In his brief, appellant for the first time complains of the legilibility of the photostatic copies which appear in the record and asks this Court to have the trial court send the originals to us by virtue of Sec. 15 of Art. 40.09, V.A.C.C.P. We note that appellant failed to comply with Sec. 7 of Art. 40.09, supra, which requires that he file an objection to the record in the trial court before the approval of the record by the trial judge.[1]

By ground of error number nine, appellant contends that error was committed when the State was permitted to cross-examine the defense witness Perry concerning an extraneous offense involving gambling. Perry was asked about appellant's business and replied that he was not in any business at the time of the homicide. Upon further questioning he stated that some weeks before appellant's business at the house was "gaming" and that "there was gambling going on in the house". When the State asked the further question about "what type of gambling" the court sustained the objection and the jury was instructed not to "consider that for any purpose" and the prosecutor was told to proceed no further. Appellant received a favorable ruling and requested no further relief. Nothing is presented for review. Cazares v. State, 488 S.W.2d 110.

By ground of error number ten, complaint is made of questions propounded to appellant on cross-examination

1. This Court has full authority to send for photographs. Also, trial courts should not send photostatic copies to this Court which are not legible.

concerning his line of business. He stated that in addition to the automobile business he had some clubs and finally that "I gambled there" at the house. When for the first time the objection was interposed that this constituted proof of an extraneous offense the court sustained the objection and no further relief was requested. No error has been shown. Cazares v. State, supra.

Ground of error number eleven complains of the court's failure to grant a mistrial when the witness Singleton testified that he was looking for a hidden panel in the wall at appellant's home. Prior to this questioning Singleton had told appellant's counsel that he had been to appellant's home looking for a hidden panel. Appellant may not complain of testimony which he has introduced. Williams v. State, 484 S.W.2d 842, Art. 38.24, V.A.C.C.P.

Ground of error number fourteen complains "that the evidence is insufficient in that it shows self-defense as a matter of law". In the case at bar, appellant was able to develop from the witness Singleton on his cross-examination of said witness most of the matters upon which he relies to show that he acted in his own self-defense. However, the rule set forth in Bell v. State, 434 S.W.2d 684, seems to be that "such testimony of the State's witness on cross-examination is not binding on the State".

Appellant cites no authority, but we observe that recently in Whitfield v. State, 492 S.W.2d 502, we held in effect that for an appellate court to say that the evidence showed self-defense as a matter of law the evidence must be uncontroverted and no issue thereon presented for the jury's determination. An issue of fact was raised for the jury's determination. Therefore, we cannot hold that self-defense was shown as a matter of law.

Ground of error number fifteen contends that the evidence is insufficient as a matter of law because the State failed to disprove exculpatory statements made by the witness Singleton on direct examination that appellant had told him "that during his excitement he had shot and killed George McGann possibly with both guns" and testimony of Officer Cooper that appellant had told him "there had been a double shooting out there. These men shot each other."

As to Singleton's testimony, we hold this statement not to be exculpatory.

As to Cooper, we observe that not until appellant had testified did Cooper testify in rebuttal as to the statement set out above.

We note from Otts v. State, 116 S.W.2d 1084, the following:

> "Another exception which should cause no trouble is where the State does not introduce the confession or admission containing the exculpatory statements in developing its case in chief, but offers same to contradict or impeach accused where he has testified as a witness, or where it fairly appears that the confession is not relied on for a conviction, but is offered to break down some defensive theory which has come into the case. . ."

We find no basis for holding that the trial court was required to give any instructions regarding the effect of the exculpatory statements.

In his final ground of error, appellant contends that the trial court erred in overruling appellant's first motion for continuance on grounds of the absence of a witness.

Attached to appellant's motion for new trial is an unsigned affidavit prepared for one Frances Keith. This is not sufficient to require the granting of a new trial. Haggerty v. State, 491 S.W.2d 916.

Finding no reversible error, the judgment is affirmed.

MORRISON, Judge

(Delivered November 7, 1973)

(Seal)

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
OF TEXAS
AUSTIN, TEXAS

I, TOMMY LOWE, Chief Deputy Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 46,795, styled:

RONNIE WEEDON, Appellant
vs.
THE STATE OF TEXAS, Appellee

the judgment of the 99th Judicial District Court of Lubbock County, Texas, was affirmed on November 7, 1973 and on December 5, 1973, "Leave to file the appellant's motion for rehearing was denied".

THEREFORE, with the denying of the leave to file the appellant's motion for rehearing, this cause was disposed of by this, The Court of Criminal Appeals of Texas, on December 5, 1973, and the appellant having

exhausted all remedies in said Court the judgment has now become final on the docket of this Court.

WITNESS my hand and seal of said Court, at office, in Austin, Texas, this the 5th day of December, A.D. 1973.

TOMMY LOWE
Tommy Lowe, Chief Deputy Clerk
Court of Criminal Appeals of Texas

## APPENDIX "B"

[Singleton—direct 119]

Q. Was there a chair over there in the corner?

A. Yes.

Q. Okay. Would you locate it there on the drawing?

A. I assume this would be it here. It would be a black leather barcalounger type chair.

Q. Did you at that time determine whether or not George McGann was dead or alive?

A. He appeared to be dead.

Q. Okay, sir. What did you do after observing Mr. McGann?

A. I asked who the other person was.

Q. Did you find out who he was?

A. He was identified, yes.

Q. Who did you find out the other party was?

A. He was purported to me to be Mike Meshell.

Q. What did you do then, please?

A. At this time Mr. Weeden approached me and made a remark that he had—

MR. TARRANT: Excuse me, Your Honor, may we approach the bench?

(Thereupon, an off the record discussion was held at bench.)

THE COURT: Mr. Singleton, answer the question that the District Attorney asked you, in response to this question.

[Singleton—direct 120]

MR. TARRANT: Your Honor, ask him not to volun-

teer anything. We would object to the last answer that he gave and ask that it be stricken.

THE COURT: The Court overrules the objection.

MR. TARRANT: Note our exception.

Q. What were you doing in the house, please?
A. I was there to assist the Sheriff's Office in an investigation.
Q. Okay. Had at that time the investigation centered on any individual?
A. No.
Q. Was anyone besides police officers—was anyone in that house in custody, in your custody or in any of the other officer's custody?
A. No, sir.
Q. What did you consider—who else did you see there in the house besides the officers?
A. Marshall Perry.
Q. Okay. Had any part of your investigation focused on him as to any criminal act?
A. No, sir.
Q. Did any part of your investigation center on Ronnie Weeden, who I have identified, as to any criminal act?
A. No, sir.

[Singleton— 121]

Q. What did you consider these two men, Marshall Perry and Ronnie Weeden, at that time?

MR. TARRANT: We will object to that.

THE COURT: The Court will sustain the objection.

Q. Was anyone in custody at that time, in your custody at the house?

A. No.

Q. Okay. You were approached—after you had found out who this other person was, were you approached by anyone besides police officers?

MR. TARRANT: Your Honor, excuse me, but is leading and we object to it. We object to that because the District Attorney is leading—

THE COURT: The Court will overrule it.

Mr. TARRANT: Note our exception.

THE COURT: Yes, sir.

Q. Who did you talk with after that, please?

A. Mr. Weeden.

Q. What did he say to you, please?

MR. TARRANT: Excuse me just a minute, Your Honor, I think possibly we should have him on voir dire, probably out of the presence of the jury.

THE COURT: The Court will overrule your request and you may have your exception.

[Singleton—direct—voir dire 122]

MR. TARRANT: Please note my exception.

THE COURT: Yes, sir. Go ahead and ask your question, Mr. Jackson.

MR. TARRANT: Your Honor, I think probably I ought to have a bill and we had better do that out of the presence of the jury.

THE COURT: All right. The jury will please retire.

(Thereupon, the following proceedings took place outside the presence of the jury.)

VOIR DIRE EXAMINATION

BY MR. TARRANT:

Q. What would be the answer to that question, Mr. Singleton?

A. To the extent that Mr. Weeden explained to me the circumstances that occurred prior to our arrival.

Q. What did he say?

A. He related that he had shot and killed Mr. McGann and possibly used both weapons.

Q. Did you make some kind of report of that at the time?

A. Yes.

Q. As I understand it now, there was some other officers there when you got there?

A. Yes, sir.

[Singleton—voir dire 123]

Q. Do you know who they were?

A. Mr. Jim Cooper and Charlie Bowman.

Q. And you say there hadn't been any—

THE COURT: Mr. Weeden, don't you leave this courtroom without—just don't leave this courtroom without letting your counsel know something about it.

Mr. TARRANT: I'm sorry, Your Honor, I had no idea.

Q. Did you give Mr. Weeden any type of legal warning before talking to him there?

A. Yes, sir.

Q. What warning did you give him?

A. To the extent that—

Q. I would like know the exact words?

A. He didn't have to make a statement and he could have an attorney present.

Q. Is that all that you told him?

A. Yes.

Q. You told him nothing else other than that?

A. No, sir.

MR. TARRANT: Well, we object to it on this grounds, it does not conform with the Miranda Statute or any other statute. He was not warned of his rights

[Singleton—direct cont. 124]

THE COURT: I believe in the state of the record at this time that the Court will respectfully overrule your objection.

MR. TARRANT: We except to the ruling of the Court.

THE COURT: Yes, sir.

MR. TARRANT: May I object to it now and let him go ahead, and not object to it while he is on the stand and have any objections—

THE COURT: Yes, sir. It will be all right for you to

make it as a part of your bill without making further objections to it if you want.

(Thereupon, the jury was returned to the jury (box and the following proceedings took place (before the Court and jury.

DIRECT EXAMINATION (CONT)

BY MR. JACKSON:

Q. Mr. Singleton, where were you in the house out there when you were approached by Ronnie Weeden?

MR. TARRANT: Excuse me just a minute. I object to the form of the question. I don't believe there is any testimony that he was ever approached by Weeden.

THE COURT: The Court will sustain the objection.

Q. All right. Where did you see Mr. Weeden, if you saw him?

[Singleton—direct cont. 125]

A. The first time that I saw him he was near the bar area, in the general vicinity right here. (indicating)

Q. Okay. Where were you, please?

A. I had come in this door right here.

Q. Where did you go then, please, where did you go in the structure?

A. I went to this body and this one. (indicating)

Q. Where was Mr. Weeden at that time?

A. He was still in this area right here.

Q. Okay. After going over here you said that you went over to this body?

A. Yes.

Q. And Mr. Weeden was here, is that correct?

A. In that area, yes, sir.

Q. Okay. What did you do after going over to this body, please?

A. That was at the time that I asked who this was?

Q. Okay. And that was related to you by other officers, is that correct?

A. Yes.

Q. What did you do then, what was the very next thing that you did, please?

A. At this time I talked to Mr. Weeden.

Q. Did he say anything to you?

[Singleton—voir dire 126]

MR. TARRANT: Excuse me. May I have him on voir dire to see if the sequence is properly in line.

THE COURT: All right.

VOIR DIRE EXAMINATION

BY MR. TARRANT:

Q. Mr. Singleton, I think at that time you gave him a legal warning, something that you considered a legal warning, didn't you?

A. Yes.

Q. What was the warning that you gave him?

MR. JACKSON: Your Honor, I believe this is taking my direct examination.

THE COURT: The Court is going to sustain the objection.

MR. TARRANT: Well, I am just trying to get the sequence proper, Your Honor. If he said something to Weeden and if Weeden said something, I want to get it in properly, if he said something to Weeden first.

THE COURT: Let the State develop it.

MR. TARRANT: I am going to object to the ruling of the Court.

THE COURT: The Court will overrule the objection.

[Singleton—direct cont. 127]

MR. TARRANT: Note our exception.

DIRECT EXAMINATION (Cont.)

BY MR. JACKSON:

Q. Who was the first one, you or Mr. Weeden, to say anything right there in that room?

A. Mr. Weeden.

Q. Okay. What is the first thing that he said to you then?

A. "I would like to talk to you".

Q. Okay. What did you do then, did you talk to him right there in that room?

A. No. I stepped to another room.

Q. Why did you step to another room?

A. Mr. Weeden desired this in private.

Q. Who desired this?

A. Mr. Weeden.

Q. Did he tell you that?

A. Yes.

Q. What did he tell you?

A. His exact words, "I would like to talk to you in private".

Q. Did he say where any place in private would be?

A. No.

Q. What did Mr. Weeden do then, please?

A. Mr. Weeden and I stepped to another room.

[Singleton—direct cont. 128]

Q. Okay. Did you both go shoulder to shoulder or did you lead him into that room or what, who went first?

A. I do not recall.

Q. Okay. Which room did you go into?

A. In this area here. (indicating)

Q. Okay. In that room that you just pointed out?

A. Yes.

Q. Did you have any conversation while you were walking to that room?

A. Not that I recall.

Q. What was the first thing that was said, if anything, when you reached the room that you pointed out?

A. Mr. Weeden related that he could clear this matter up and say specifically what had happened.

Q. Okay. What did you do then?

A. I told him that he didn't have to make any statements and that he could have an attorney if he so desired.

Q. What did he say.

A. He asked, "would I need one"?

Q. Okay. What was said?

A. I asked if he had contacted an attorney.

Q. What did he say?

A. He said, "yes".

Q. And did he say anything else about an attorney?

[Singleton—direct cont. 129]

A. He said that he had attempted to contact Mr. Phil Brummett and was not able to do so, and had contacted an attorney in Houston.

Q. Did you ask him anything else at that very point?

A. No.

Q. Did he say anything then?

A. Yes.

Q. What was that?

A. He said that during his excitement that he had shot and killed George McGann, possibly with both guns.

Q. Okay. Were you and he the only—you and Ronnie Weeden the only ones in that room that you pointed to?

A. At that time, yes.

Q. Did you leave that room—when did you leave that room?

A. After Mr. Weeden did.

Q. Okay. Where did you go then?

A. I assisted the other officers in the search of the residence and general investigation.

Q. Okay. Did you continue your general investigation, is that what you testified to?

A. Yes.

MR. JACKSON: May we approach the bench, Your Honor?

THE COURT: Yes.

[Singleton—direct cont.—cross 130]

(Thereupon, an off the record discussion was (held at the bench.

## CROSS EXAMINATION

BY MR. TARRANT:

Q. Would you tell me your name again, please?
A. Jim Singleton.
Q. Where are you from, Mr. Singleton?
A. Lubbock.
Q. Were you born and raised here?
A. No, sir.
Q. Where are you from?
A. I was born in Brownfield.
Q. How long have you been here in Lubbock?
A. I came to Lubbock in September of 1956.
Q. Who did you work—did you work for someone down there.
A. Department of Public Safety.
Q. That is the highway patrol?
A. Yes, sir.
Q. And you were with them for how long?
A. I believe ten years.
Q. Until '66?
A. Yes, sir.
Q. And then what did you do?

## APPENDIX "C"

### CONSTITUTION OF THE UNITED STATES

Fifth Amendment

"No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

## APPENDIX "D"

CONSTITUTION OF THE UNITED STATES

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by and impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

## APPENDIX "E"

### CONSTITUTION OF THE UNITED STATES

Fourteenth Amendment, Section 1.

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."